(1)

Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

TINA ARMSTRONG,

Petitioner,

v.

La QUINTA INNS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ERIC D. DIXON
Counsel of Record
309 SOUTH AVENUE A
PORTALES, NM 88130
(505) 359-1233

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

39 pp

QUESTIONS PRESENTED

I. MAY PROPERLY AUTHENTICATED POLICE REPORTS BE ADMITTED AS BUSINESS OR PUBLIC RECORDS PURSUANT TO FED. R. EVID. RULE 803(6) AND (8).

II. MAY A LAY WITNESS TESTIFY REGARDING A STANDARD OF CARE VOLUNTARILY ASSUMED BY HIS EMPLOYER PURSUANT TO FED. R. EVID. RULE 701.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Tina Armstrong is an individual currently residing in Yuma Arizona; Ms. Armstrong has no corporate affiliations.

Respondent

Respondent La Quinta Inns, Inc., is a Delaware Corporation which is wholly owned subsidiary of the La Quinta Company, a Delaware Corporation. The La Quinta Company is a wholly owned subsidiary of Meditrust Operating Company, a Delaware corporation. Meditrust Operating Company, together with Meditrust Corporation, comprise a paired-share real estate investment trust (REIT) which is publicly traded on the New York Stock Exchange under the symbol "MT".

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OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth circuit is not reported. A copy of the Order and Judgment is included in the Appendix at Appendix A at 1a. The Order filed July 13, 2001 of the Tenth Circuit denying the petition for rehearing is included in the Appendix at Appendix B at 5a. The Memorandum Opinion of the District Court for the District of New Mexico is not reported. A copy of the Memorandum Opinion is included in the Appendix at Appendix C at7a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment on June 15, 2001. Petitioner filed a timely Petition for Rehearing, which the United States Court of Appeals denied by Order filed July 13, 2001. This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28U.S.C.§§ 1254 (1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FED. RULES EVID. RULE 701

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. RULES EVID. RULE 803

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (6) **Records of Regularly Conducted Activity.**-A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902 (11), Rule 902 (12), or a statute permitting

certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the source of information or other circumstances indicate lack of trustworthiness.

FED. RULE EVID. RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular

possession thereof, or the Panama Canal Zone, or the Trust territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(11) Certified Domestic Records or Regularly Conducted Activity.- The original or a duplicate of a domestic record of a regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record-

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under the paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

STATEMENT OF THE CASE

Tina Armstrong was brutally raped, sodomized, assaulted and robbed in her second floor room at a La Quinta Hotel shortly after arriving as a guest. The rapist was able to force his way into Ms. Armstrong's second floor room in broad-day light. The rapist has never been caught. He was able to enter the hotel grounds without being seen by anyone from La Quinta. The rapist was able leave the hotel without anyone from La Quinta seeing, stopping or apprehending him. The La Quinta in question is just off a busy interstate highway. It is an exterior corridor, three story hotel with approximately one hundred and twenty nine rooms. There were no limitations on public access to the property. Anyone could enter the premises twenty-four hours a day, seven days a week.

La Quinta had established a security policy manual. The head of corporate security for La Quinta who had written the manual was deposed by Ms. Armstrong's attorney. In his deposition he stated that La Quinta had an obligation to use reasonable care to protect Tina Armstrong. The Court disallowed the testimony as calling for a "legal conclusion". Mr. Devine had been with La Quinta as corporate director of security and safety for over five years. This testimony was crucial to Ms. Armstrong in establishing a duty of care by La Quinta.

In addition, Ms. Armstrong attempted to submitted fourteen different police reports from the Amarillo Police Department regarding criminal activities in the same block as the La Quinta in question. The police reports were all under the seal of the Amarillo Police Department and attached to an affidavit from the custodian of records. These police reports were tendered to show foreseeability of criminal activity

including rape on La Quinta's own property. The Court rejected the tendered police reports.

ARGUMENT FOR GRANTING WRIT

I. MAY PROPERLY AUTHENTICATED POLICE REPORTS BE ADMITTED AS BUSINESS OR PUBLIC RECORDS UNDER FED. R. EVID. RULE 803 (6) AND (8).

Ms. Armstrong tendered fourteen different police reports from the Amarillo Police Department between 1994 through 1998. Each police report was stamped "certified-Amarillo Police Department, city of Amarillo, Texas." See **FED. R. EVID. Rule 902**. In addition, the affidavit from the custodian of records mirrored the language contained in Fed. R. Evid. 803 (6) and (8).[1] It was crucial to Ms. Armstrong's

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[1] The police reports are summarized:

Date	Location	Offense
04-19-98	Phillips 66-2209 Coulter	attempted armed robbery
07-08-97	Days Inn-2102 Coulter	burglary
07-01-97	Days Inn-2102 Coulter	burglary
06-08-97	Days Inn-2102 Coulter	burglary
05-27-97	Days Inn-2102 Coulter	burglary
05-26-97	Days Inn-2102 Coulter	burglary
05-17-97	Days Inn-2102 Coulter	burglary
08-03-96	Phillips 66-2209 Coulter	aggravated assault
12-25-95	Waffle House/La Quinta	sexual offense
10-19-95	Comfort Inn-2100 Coulter	armed robbery
10-02-95	1-40 and Coulter	armed robbery
12-30-94	La Quinta	aggravated assault
05-17-94	Comfort Inn-2100 Coulter	robbery

case to show that criminal activity had taken place on and around the La Quinta property sufficient to put La Quinta on notice that a rape might take place on its property. See, **Timberwalk Apartments Partners, Inc. v. Cain,** 972 S. W. 3d 749 (Tex. 1998).

The affidavit and attached police reports were admissible under Fed. R. Evid. Rule 803 (8) public records exception. The purpose of the public records and reports exception to the hearsay rule is a practical one. That is, to end the need for constant attendance of public officers in court to prove routine matters. **Gilbert v. Gulf Oil Corp.**, 175 F.2d 705 (4th Cir.1949). An affidavit from the custodian of records is sufficient to lay a foundation for the admission of records. **Wilson v. Zapata Off-Shore Co.,** 939 F.2d 260 (5thCir.1991). See also, **FED.R.EVID. Rule 902 (1) (4) and (11).**

i. ***The affidavit and attached police reports were admissible as a business record.***

The affidavit and police reports were admissible under Fed. R. Evid. Rule 803 (6)-business records. The Third Circuit Court of Appeals has held "that the testimony of the custodian or other qualified witness is not a sine qua non of admissibility ... where the requirements for qualification as a business record can be met by ... affidavits..." **In re Japanese Electronics Products,** 723 F. 2d 238 (3rd Cir.1983). The business record exception to the hearsay rule does not require the presentation of affirmative indicia of trustworthiness other than those explicitly required by the rule

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setting forth the exception. If those are met, the burden of presenting evidence shifts to the party opposing the admission to show indicia of a lack of trustworthiness. **Travelers Ins. Co. v. U. S.,** 46 F.3d 458 (Fed. Cir.2000).

The District Court characterized the police reports as consisting "of statements of witnesses to alleged crimes as recorded by police officers." This is an unfair characterization. The reports all contained a page of statistics regarding the suspects' description, witness names, physical location of the premises et cetera. While, the reports do record some witness statements (which may be admissible under 801 (1) and (2)), the vast majority of the reports consisted of the officers investigation, opinions and conclusions. Public records are not deemed inadmissible because they contain facts, conclusions or evaluations. **Thompson v. Office and Professional Employees Intern. Union,** 74 F.3d 1492 (6thCir.1996). See also, **Beech Aircraft Corp. v. Rainey,** 109 S. Ct. 439, 488 U.S. 153, 102 L.Ed.2d 445 (1988) [factually based conclusions or opinions are not on that account excluded from the scope of the rule which includes public records and reports containing factual findings among the types of statements that are not excludable by the hearsay rule.]

ii. ***The District and Appellate Courts' ignored established Supreme Court precedent***

The District Court excluded the business/public records affidavit as "unreliable". The District court used the wrong standard. Fed. R. Evid. Rule 803 (8) establishes general admissibility unless the record is deemed somehow untrustworthy. **In re Air Disaster at Lockerbie Scotland,** 37 F. 3d 804 (2ndCir.1994). The Court should start from the premise that the records are reliable. **Fayson v. Schmadl,** 126

F.R.D. 419 (D.D.C.1988). Records made by public officials in the ordinary course of their duties have a strong indicia of reliability since public officials are presumed to perform their duties properly and generally lack motive to falsify information. **Felzcerek v. INS,** 75 F.3d 112 (2ndCir.1996). The Supreme court has stated that ordinarily it presumes that public officials have properly discharged their official duties. **Bracy v. Gramley,** 117 S. Ct. 1793, 520 U.S. 899, 138 L.Ed. 97 (1997).

iii. The Courts below failed to follow established law regarding the burden of proof.

The party opposing the introduction of a report under the public records exception must prove that the report is not trustworthy. **Thompson v. Office and Professional Employees Intern. Union,** 74 F.3d 1492 (6thCir.1996). The party opposing, must show untrustworthiness beyond the fact that the declarant is not in court to testify. **Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.,** 805 F.2d 49 (2ndCir.1986). See also, **Montiel v. City of Los Angeles,** 2 F.3d 335 (9thCir.1993) [District court should presume that an ad hoc report on the police department was trustworthy and shifted the burden of establishing its untrustworthiness to the city].

Federal courts have repeatedly admitted police reports into evidence. See, **Simmons v. Chicago and Northwestern Transp. Co.,** 993 F.2d 1326 (8thCir.1993); **Wilson v. Beebe,** 770 F. 2d 578 (6thCir.1985); **Perrin v. Anderson,** 748 F.2d 1040, (10thCir.1986); **State Farm Mut. Auto Ins. Co. v. Brown,** 767 F.Supp. 1151 (1991). Both the District Court and the Tenth Circuit Court of Appeals failed to follow precedent established within the Tenth Circuit and other

Circuits related to admissibility of police reports without a testifying witness.

The District Court found that "a substantial portion of many of the reports had been redacted." However, the only redactions were witness names and other identifying information. The redaction did not make the police reports untrustworthy. The redaction went to the weight not to admissibility. **Fayson v. Schmadl, supra.**

Finally, the District Court mistakenly held that because "Defendant admitted it had never heard of any of the crime reported, the only probative value of such reports is as proof that the crimes reported actually occurred." First, counsel for La Quinta claimed to have "never heard of the crimes". However, at least one of its employees testified by deposition as to have remembered the armed robbery at the Phillips 66 down the street from La Quinta. Secondly, under Texas law, evidence of prior crime near the property is probative of foreseeability. Foreseeability is determined "in light of what the premises owner knew or should have known before the criminal act occurred." **Timberwalk, supra.** at 757.

There was a factual issue whether La Quinta should have known about this serious criminal activity in the same block as La Quinta. Criminal activity within the same block as La Quinta was relevant and admissible. La Quinta should have known about these crimes occurring in its same block, some right next door. The United States Supreme Court has held that the basic standard of relevance under the Federal Rules of Evidence is a liberal one. **Daubert v. Merrell Dow Pharmaceuticals, Inc.,** 113 S.Ct. 2786, 509 U.S. 579, 125 L.Ed.2d 469 (1993). Yet the District Court and the Appellate

Court took a narrow, and constrained view of the relevancy of the official police records.

iv. ***The Courts failed to follow well-established authority by deeming police reports and records inadmissible evidence.***

The Third Circuit has held it was error to exclude police reports offered by a Defendant, where the prosecution did not show the officer had "any reason not to be accurate in setting out what he knew in his police report." **U.S. v. Versaint,** 849 F.2d 827, 832 (3rdCir.1988). A report by an officer in the ordinary course of business based on the information supplied by a complaintant is admissible. **Rosario v. Amalgomated Ladies Garment Cutters' Union Local 10,**605 F.2d 1228, 1250-51 (2ndcir.1979), *cert. denied,*446 U.S. 919 (1980). See also, **FAA v. Landy,** 705 F.2d 624, 632 (2ndcir.1983) [telex by German government to FAA admitted as incorporated in FAA's factual findings resulting from investigation made pursuant to lawful authority].

ISSUE II: MAY A LAY WITNESS TESTIFY REGARDING A STANDARD OF CARE VOLUNTARILY ASSUMED BY HIS EMPLOYER PURSUANT TO FED. R. EVID. RULE 701.

Mr. Patrick Devine was the corporate director of security and safety for La Quinta. Mr. Devine was primarily responsible for writing the La Quinta security manual. The security policy was put into effect in December 1995. He testified during Ms. Armstrong's case in chief by deposition.

Mr. Devine was asked by counsel "Is it your opinion you were responsible to use reasonable care to protect Tina Armstrong from the assaults of third parties ?" La Quinta's counsel objection on the basis that the question called for a "legal conclusion." Counsel's question was referring to policies of La Quinta, not legal conclusions. Mr. Devine's answer recorded in the deposition was:

> *Q. Is it your opinion that you were responsible to use reasonable care to protect Tina Armstrong from the assaults of third parties?*
> *A. I'm sorry. Meaning was La Quinta responsible to use reasonable measures?*
> *Q. Yes, sir. When I use 'you'. I'm referring to La Quinta.*
> *A. Yes I do.*
> *Q. Not you personally?*
> *A. Yes I do, reasonable measures.*

Ms. Armstrong's counsel was not requesting a "legal opinion" but instead was asking the Corporate Security

Director what La Quinta's policies were based on using his own personal knowledge and observations as Security Director. A witness experienced in technical matters and qualified to do so may give his opinion as to the cause of matters even though it may involve an ultimate fact to be finally decided by the jury. **Dickerson v. Shepard Warner Elevator Co.,** 287 F.2d 255 (6thCir.1961).

The testimony was crucial to Ms. Armstrong's case in establishing a voluntary duty assumed by La Quinta. Further, it was pertinent for impeachment to rebut La Quinta's claim that it owed no duty to Ms. Armstrong to prevent her rape while a paying guest at the La Quinta Hotel. **Dugan v. EMS Helicopters, Inc.,** 915 F.2d 1428 (10thCir.1999); **Murrey v. U.S.,** 73 F .3d 1445 (7th Cir. 1996). The modern trend is to admit lay opinion testimony. **Joy Mfg. Co. v. Sola Basic Indus., Inc.,** 697 F.2d 104, 110 (3rdCir.1982). Indeed, the Advisory Committee Notes indicates "[t]he basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." **Fed.R.Evid. Advisory Committee Notes to Rule 704.**

A lay witness may offer an opinion if it is helpful to a clear understanding of his testimony or the determination of a fact in issue. **Magna Trust Co. v. Illinois Cent. R.G.,** 728 N.E.2d 797 (Ill. App.2000). An opinion is "helpful to the trier of fact", within the meaning of Rule 701,if it aids or clarifies an issue that the jury would not otherwise be as competent to understand. As long as the circumstances can be presented with greater clarity by stating an opinion, then the opinion is helpful to the trier of fact. **Lauria v. Nat. Railroad Passenger Corp.,** 145 F.3d 593 (3rd Cir.1998). Further, lay opinions of a technical nature may be admitted when the witness possesses sufficient and relevant specialized

knowledge or experience to offer an opinion. **Hulmes v. Honda Motor Co., Ltd.,** 960 F.Supp. 844 (D.N.J.1997).

i. ***The Courts ignored well-established precedent within the Tenth Circuit and other circuit courts by disallowing the testimony.***

The Tenth Circuit court of Appeals has previously allowed a lay witness to testify regarding the standard of care and causation in several instances similar to the present case. In **Weese v. Schukman,** 98 F.3d 542 (10thCir.1996), it was held that a physician in a medical malpractice case arising from treatment for carbon monoxide poisoning, who was not an expert in carbon monoxide poisoning was allowed to testify as a lay witness. The Court held that the opinions were based on his experience as a physician and were clearly helpful to an understanding of his decision making process.

In another Tenth Circuit case, the Circuit Court held that a witness could testify to the safety of a vestible at the time of the accident because it was rationally based on perception of a lay witness and helpful to a clear understanding of the witnesses testimony. **Getter v. Wal-Mart Stores, Inc.,** 66 F.3d 1119, *certiorari denied,* 516 U.S. 1146 (10th Cir.1995). Finally, the Tenth Circuit has held that it was permissible for a law enforcement officer to give lay testimony based on "his experience" as to "whether, in his opinion, going into a building was a 'search'". **Specht v. Jensen,** 832 F.2d 1516, 1526 (10thCir.1987) *remanded on other grounds,* 853 F.2d 805 (10th Cir. 1988), *cert. Denied,* 488 U.S. 1008 (1989).

ii. ***The Court ignored well-established authority from other Circuits' allowing such lay opinion testimony.***

Lay testimony similar to Mr. Devine's has been accepted by the Courts in numerous federal cases. For example, the Second Circuit Court of Appeals has allowed a lay witness to testify that "age discrimination" was involved in the company's termination of an employee based on his "intimate involvement" with the Company's operations and decision-making process. **Lightfoot v. Union Carbide Corp.,** 110 F.3d 898, 911-912 (2ndCir.1997). In **Samples v. Atlanta,** 846 F.2d 1328 (11thCir.1988), a longtime employee of the police department testified in a civil rights action that, in his opinion, the police department had an unwritten policy or practice of encouraging police brutality. In the case of **Slayton v. Ohio Dept. of Youth Services,** 206 F. 3d 669 (6thCir.2000), the testimony of supervisors was held not impermissible lay opinion. The supervisor testified that the condition of an employee's co-worker repeatedly playing rap music constituted sexual harassment in violation of the agency's policies. The statement was related to the employer's policies and not the law.

The Eighth Circuit Court of Appeals held as a permissible lay opinion a railroad executive's testimony that in their opinion trains with cabooses were no safer than cabooseless trains. The opinion was based on supervising railroad operations, years of experience in the industry, and a review of employee accident records prepared in the ordinary course of business. **Northern R. Co. v. State of Neb.,** 802 F.2d 994 (8thCir.1986). The Eighth Circuit has also held that personal knowledge or perceptions based on industry experience is a proper foundation for lay opinion or inference testimony. **Wactor v. Spartan Transp. Corp.,** 27 F.3d 347, 350 (8thCir.1994). Testimony may use words with

compatible legal and lay meanings. **U.S. v. Misle Bus.& Eq. Co.**, 967 F. 2d 1227, 1234 (8thCir.1992).

The individual experience and knowledge of a lay witness may establish his competence without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge. **Randolph v. Collectramatic, Inc.,** 590 F.2d 844 (10thCir.1979). Ms. Armstrong was attempting to establish that the security policies voluntarily implemented by La Quinta established a duty of care to her.

The security manager, Mr. Devine, had been primarily responsible for writing the security manual. He had personal knowledge of what La Quinta's policies and practices were. The question asked by counsel did not impermissibly call for a legal conclusion, but was directed at La Quinta's own voluntarily established duty of care. The opinion was appropriate pursuant to Fed. R. Evid. Rule 701. The United States Supreme Court has long allowed lay opinions based upon personal knowledge. **Connecticut Mut. Life Ins. Co. v. Lathrop,** 4 S.Ct. 533, 111 U.S. 612, 28 L.Ed. 536 (1884). [lay opinion testimony regarding insanity allowed].

CONCLUSION

The Court of Appeals decision upholding the District Court is not consistent with other Circuits opinions regarding the admissibility of lay opinion testimony and business/public records.

Respectfully Submitted:

Eric D. Dixon
Counsel of Record
309 South Avenue A.
Portales, New Mexico, 88130
(505) 359-1233
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-2212

[Filed: June 15, 2001]

TINA ARMSTRONG,
Plaintiff-Appellant,

v.

LA QUINTA INNS, INC.,
a Delaware corporation,
Defendant-Appellee.

JUDGES:

SEYMOUR, BRORBY, and BRISCOE, Circuit Judges.

Appeal from the United States District Court
of New Mexico
Bruce D. Black, District Judge
Case No. CIV-99-531-BB/LFG

OPINION BY: Wade Brorby

OPINION:

ORDER AND JUDGMENT*

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In this diversity case, plaintiff Tina Armstrong is appealing the district court's entry of judgment in favor of defendant La Quinta Inns, Inc. under Fed. R. Civ. P. 50(a). Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

Plaintiff checked into a La Quinta Inn in Amarillo, Texas, on the afternoon of June 28, 1998. Plaintiff alleges that, after she located her room and was leaving the room to return to her car to get her luggage, an unknown man pushed her back into the room and sexually assaulted her. Plaintiff subsequently filed a diversity action against defendant in the United States District Court for the District of New Mexico. Plaintiff asserted a premises liability claim against defendant under Texas law alleging that defendant was negligent in failing to provide adequate security at the hotel and that

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

defendant's negligence was a cause of the sexual assault.[1]

Plaintiff's case proceeded to trial before a jury on June 7, 8, and 9, 2000. At the conclusion of plaintiff's case-in-chief, the district court found that no reasonable juror could conclude, under Texas law, that defendant should have foreseen that a sexual assault or other similar violent crime was likely to occur at the hotel. Relying on the decision of the Texas Supreme Court in *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), the district court therefore granted defendant's motion under Fed. R. Civ. P. 50(a) for judgment as a matter of law.

Plaintiff argues on appeal that she put forth sufficient evidence of prior criminal activity, both at the hotel and in the immediate vicinity, to establish a prima facie case of foreseeability under *Timberwalk*. We have conducted a de novo review of the district court's decision to grant defendant judgment as a matter of law, and we affirm for substantially the same reasons set forth in the district court's memorandum opinion dated June 13, 2000.[2]

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[1] Because the district court's jurisdiction is based on diversity of citizenship under *28 U.S.C. § 1332*(a)(1), we must apply state law to the substantive issues on this appeal. *See Peck v. Horrocks Eng'rs, Inc., 106 F.3d 949, 952 (10th Cir. 1997)*. The district court applied Texas law to plaintiff's substantive claims, and the parties have not challenged the applicability of Texas law on appeal.

[2] Plaintiff also argues that the district court erred in: (1) refusing to allow her liability expert to supplement his expert report and testify regarding defendant's security manual; (2) refusing to allow into evidence certain deposition testimony from defendant's corporate security director; and (3) refusing to allow into evidence certain deposition testimony concerning drug use on the hotel

Accordingly, the judgment of the United States District Court for the District of New Mexico is AFFIRMED.

Entered for the Court
Wade Brorby

Circuit Judge

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premises in March of 1998. We hold that the district court's evidentiary rulings were not an abuse of discretion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-2212

[Filed: July 13, 2001]

TINA ARMSTRONG,
Plaintiff-Appellant,

v.

LA QUINTA INNS, INC.,
a Delaware corporation,
Defendant-Appellee.

JUDGES:

SEYMOUR, BRORBY, and BRISCOE, Circuit Judges.

ORDER

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

By: /s/ Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
OF NEW MEXICO

No. CIV 99-531 BB/LFG

[Filed June 13, 2000]

TINA ARMSTRONG,
Plaintiff-Appellant,

v.

LA QUINTA INNS, INC.,
a Delaware corporation,
Defendant-Appellee.

MEMORANDUM OPINION
SUPPORTING GRANTING
DEFENDANT'S RULE 50 MOTION

THIS MATTER is before the Court on Defendant's motion for judgment as a matter of law pursuant to Federal Rules of Civil Procedure 50(a), and the Court being duly advised, FINDS the motion is well taken and should be granted.

DISCUSSION

Plaintiff, Tina Armstrong, checked into the La Quinta Inn located at 2108 South Coulter in Amarillo, Texas, on June 28, 1998. It was approximately 4:30 PM. After Plaintiff located her room and was leaving the room to get her luggage our of her car, she was-pushed back into the room by a man in a green shirt. Plaintiff was sexually assaulted repeatedly and the assailant was never apprehended.

Under Texas law, it is the general rule that "a person has no legal duty to protect another from the criminal acts of a third person." *Timberwalk Apartments Partners, Inc. v. Cain*, 972 S.W. 2d 749, 756 (Texas 1998). The exception is that "[o]ne who controls...premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." *Id.* This legal duty exists, then, only when the risk of criminal conduct is both unreasonable and foreseeable. Whether such a risk was foreseeable cannot be determined in hindsight but rather must be viewed in light of what the premises owner knew, or should have known, before the criminal act occurred. *Id.* at 757. In deciding this issue, the Texas courts require consideration of:

(1) Whether any criminal conduct previously occurred on or near the property;

(2) How recently it occurred;

(3) How often it occurred;

(4) How similar the conduct was to the alleged incident; and

(5) What publicity was given the criminal conduct to indicate that the landowner knew or should have known about it.

Timberwalk at 758; *Plowman v. Glen Willows Apartments*, 978 S.W. 2d 612, 617 (Tex. App. 1998); *Kelley v. Wurzbach*, 1999 WL 33640 at *3 (Tex. App.).

Plaintiff failed to put on sufficient evidence to demonstrate that La Quinta knew or should have known of the risk that Plaintiff would likely be the victim of a violent criminal activity on La Quinta's property. *See Walker v. Harris*, 924 S.W. 2d 375 (Tex. 1996). Indeed, the only admissible evidence that Plaintiff produced was that three or four televisions, and some personal belongings had been stolen from rooms on the property more than one year before this sexual assault.

Plaintiff attempted to subpoena Amarillo, Texas, police officers to testify as to other crimes in the vicinity, but the City of Amarillo moved to quash the subpoenas. Since Amarillo is obviously not within New Mexico and is more than 100 miles from the place of trial, the Court was required to quash those subpoenas. Fed R. Civ. P. 45; *see also* 28 Fed. Proc., L.Ed. § 65:278. Plaintiff's counsel then attempted to move the Amarillo police reports into evidence by attaching an affidavit of Milton Pool, an Amarillo police officer acting as the records custodian.

The Court found these records could likely overcome Defendant's authentication challenge under Federal Rule of Evidence 902,[1] however, Defendant also raised a hearsay challenge. In response, Plaintiff relied primarily on Federal Rule of Evidence 803(6), the business record exception.[2] While the United States Supreme Court has adopted an amendment to Rule 803(6) which would potentially permit the use of such an affidavit, the present language requires "the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness." (Evidence Rules Committee Commentary p. 8 contained in House Doc. 106-225 (2000) conveying the proposed amendments to Congress).[3] *But See, In re Japanese Elec. Prods. Antitrust Litig.*, 723 F. 2d 238 (3d Cir. 1983), *rev'd on other grounds, Matsushita Elec. Indus. co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The problem with applying the proposed amendment in the present case, however, was the quality of the underlying records. They consisted of the statements of witnesses to alleged crimes as recorded by police officers. While it is difficult to determine from their face, in some instances the officers apparently thought such statements suspect and engaged in no further investigation. Morever, a substantial portion of many of the reports had

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[1] *See Hunt v. Liberty Lobby*, 720 F. 2d 631 (11th Cir. 1983), and *United States v. M'Biye*, 655 F. 2d 1240 (D.C. Cir. 1981).

[2] Plaintiff also attempted to raise Federal Rule of Evidence 803 (1) present sense impression and (2) excited utterance, but had no legal authority, and the Court was unable to comprehend the applicability of these provisions.

[3] The Supreme Court also adopted and conveyed to Congress a related amendment to Federal Rule of Evidence 902.

been redacted. Under these circumstances it would have been difficult for Plaintiff to rely on, and more particularly for Defendant to challenge, the incidents reported under *Timberwalk*. Since Defendant admitted it had never heard of any of the crimes reported, the only probative value of such reports is as proof that the crimes reported actually occurred. Without a witness to testify as to the reports, however, they lacked sufficient reliability to satisfy the *Timberwalk* requirements. *See Wilson v. Zapata Off-Shore Co.*, 939 F. 2d 260 (5th Cir. 1991) (unreliability is a basis for exclusion of business records).

Under Texas law, Plaintiff had the burden of introducing "strong" evidence that the risk of criminal conduct on La Quinta's property had reached a sufficient level Plaintiff's sexual assault was "likely." *Timberwalk* at 757. At the close of Plaintiff's case there was no evidence from which a reasonable juror could conclude that sexual assault was likely. The only evidence of even an arguably similar crime was the incident in the adjoining Waffle House parking lot 26 months earlier. However, Plaintiff had no one who could describe the *Timberwalk* criteria as to this incident or any of the other crime reports in the neighborhood to the Court or jury. *Timberwalk* and *Walker* require the Rule 50(a) motion be granted.

Dated at Albuquerque this 13th day of June, 2000.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

Counsel for Plaintiff:

Eric D. Dixon,
Portales, NM

Counsel for Defendant:

Ellen S. Casey, Hinkle Hensley Shanor & Martin,
Sante Fe, NM

Lawrence Bailey, Godwin White & Gruber,
Dallas, TX

NOV 1 2001

No. 01-491

In The

Supreme Court of the United States

TINA ARMSTRONG,

Petitioner,

v.

La QUINTA INNS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ELLEN S. CASEY
Counsel of Record
HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

LAWRENCE W. BAILEY
GODWIN, WHITE & GRUBER, P.C.
901 Main Street, Suite 2500
Dallas, Texas 75202-3727
(214) 939-4461

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING
RESPONDENT

Petitioner's identification of Respondent's corporate structure is erroneous.

Respondent La Quinta Inns, Inc. is a Delaware corporation that is a wholly owned subsidiary of The La Quinta Leasing Company, a Delaware corporation. The La Quinta Leasing Company is a wholly owned subsidiary of La Quinta Corporation, a Delaware corporation. La Quinta Corporation, together with La Quinta Properties, Inc., comprise a paired-share real estate investment trust (REIT) which is publicly traded on the New York Stock Exchange under the symbol "LQI".

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement:

Respondent La Quinta Inns, Inc. is a Delaware corporation that is a wholly owned subsidiary of The La Quinta Leasing Company, a Delaware corporation. The La Quinta Leasing Company is a wholly owned subsidiary of La Quinta Corporation, a Delaware corporation. La Quinta Corporation, together with La Quinta Properties, Inc., comprise a paired-share real estate investment trust (REIT) which is publicly traded on the New York Stock Exchange under the symbol "LQI".

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, La Quinta Inns, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of portions of the Tenth Circuit's Order and Judgment in this case.

COUNTER-STATEMENT OF THE CASE

In this diversity case, Petitioner alleged that La Quinta was negligent in failing to provide adequate security and that La Quinta's negligence proximately caused her alleged assault. The district court's grant of judgment as a matter of law to La Quinta pursuant to FED.R.CIV.P. 50(a), was affirmed by the Tenth Circuit Court of Appeals. Petitioner's motion for rehearing in the Tenth Circuit was denied.

The evidence at trial was that the alleged assailant entered Ms. Armstrong's room through a door left open by Ms. Armstrong. Contrary to Armstrong's statement, there was no need for the alleged assailant to "force" his way into her room. There was no evidence presented at trial that there was anything about the alleged assailant that would cause the personnel employed by La Quinta at its Amarillo facility to stop or apprehend him. While La Quinta is a place of public accommodation, there were significant limitations on access to the Amarillo La Quinta property, including a six-foot fence around the exterior of the property.

At the close of Petitioner's case, with one hour advance notice to La Quinta's counsel, Petitioner sought

to introduce into evidence fourteen (14) uniform incident reports by attaching them to an affidavit from a non-testifying witness employee of the Amarillo Police Department. The documents sought to be introduced were reports allegedly maintained by the Amarillo Police Department containing statements received from alleged crime victims, witnesses, and suspects. In many instances, it was not possible to determine, from the offered reports, whether any crimes had actually occurred. No evidence of the geographic proximity of the alleged incidents reported to the Amarillo La Quinta premises was introduced. Nor was there any evidence that La Quinta knew or should have known about the alleged incidents reported.

Ms. Armstrong did not offer the uniform incident reports into evidence under FED.R.EVID. 803(8). Neither the trial court nor the Tenth Circuit ruled on the admissibility of the proffered evidence under FED.R.EVID. 803(8).

The Tenth Circuit, after conducting a de novo review, affirmed the district court's judgment as a matter of law for the reasons stated by the trial judge in his memorandum opinion. *Petitioner's Appendix at 3(a).* The district court refused to admit uniform incident reports as business records without a testifying witness pursuant to FED.R.EVID. 803(6). The district court also refused to admit the reports because Plaintiff had made no showing that the alleged crimes recorded therein actually occurred, were similar to the alleged assault against Plaintiff, were geographically proximate, or that La Quinta knew or should have known of the alleged crimes contained in the reports.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S INCLUSION OF FED.R.EVID. 803(8) IN QUESTION NO. 1 AS A BASIS FOR ADMISSION OF THE UNIFORM INCIDENT REPORTS IS IMPROPER AS IT WAS NOT RAISED OR ARGUED TO THE DISTRICT COURT OR RULED UPON BY THE TENTH CIRCUIT.

The Court will not grant certiorari on questions not pressed or passed upon below. *United States v. Williams*, 504 U.S. 36 (1992). At no point during the extensive argument made to the district court on the issue of the admissibility of the uniform incident reports did Petitioner's counsel ever raise or argue FED.R.EVID. 803(8), the public records exception to the hearsay rule. It is clear that the district court did not rule on the exhibit's admissibility under FED.R.EVID. 803(8) in its Opinion. *See Petitioner's Appendix at p. 10(a).* Nor did the Tenth Circuit address the exhibit's admissibility under FED.R.EVID. 803(8). *See Petitioner's Appendix at 3(a).* The Tenth Circuit merely adopted the reasoning of the district court which based its rejection of the exhibit on its inadmissibility under FED.R.EVID. 803(6), and its lack of probative value on the factors necessary to establish La Quinta's liability under Texas law. *See Petitioner's Appendix at 11(a).*

II. PETITIONER MISSTATES THE NATURE OF THE EVIDENCE EXCLUDED IN QUESTION NO. 2.

In Question No. 2, Petitioner misstates the nature of the deposition testimony which the district court excluded. Petitioner refers to the excluded deposition testimony as "testimony regarding a standard of care

voluntarily assumed by" La Quinta, *Petition for Certiorari ("Petition") at i*, and evidence of "La Quinta's own voluntarily established duty of care." *Petition at 13.* This is not a correct description of Mr. Devine's testimony. It is apparent from the excerpt of Mr. Devine's deposition testimony quoted in the Petition that Petitioner was soliciting an opinion on the legal question of whether La Quinta had a duty to exercise reasonable care to protect invitees from the intentional torts of third parties. *See Petition at 13* (quoting Mr. Devine's testimony). It is also apparent from the deposition, itself, that the question is not merely "referring to policies of La Quinta." *Petition at 13.* In any case, a jury would have no way of determining the context of the deposition by the isolated portion sought to be presented.[1] Nor would Petitioner's failure to produce any evidence as to the standard of care in the hotel industry generally[2] have been remedied by the introduction of Mr. Devine's testimony as to La Quinta's "duty."

Petitioner misstates the nature of the excluded evidence when she describes Mr. Devine's testimony as

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[1] Because the Devine deposition excerpt at issue was offered at trial, in isolation from any deposition testimony regarding security policies or other topics that preceded the proffered deposition testimony, the testimony has no context other than a request for a legal opinion.

[2] Discussing Plaintiff's failure to present testimony on the standard of care at oral argument on La Quinta's Motion for Judgment as a Matter of Law, the trial court stated: "We have nothing to compare it to. All we have is a crime which is extremely unfortunate. But we don't have any other motels. We don't know what the Days Inn or the Comfort Inn or anyone else in the country in similar circumstances does . . . ".

relating only to La Quinta's own policies or directed at establishing a "standard of care."

III. PETITIONER HAS FAILED TO DEMONSTRATE ANY BASIS FOR THIS COURT'S ASSUMPTION OF CERTIORARI JURISDICTION.

Plaintiff advances no argument on why this Court should grant certiorari in this case. Presumably, Petitioner requests this Court to exercise its certiorari jurisdiction to find the district court abused its discretion when it failed to admit the two pieces of evidence at issue and to then determine if any such abuse of discretion affected the ultimate result in the case – judgment as a matter of law. Abuse of discretion is the standard exercised by the federal appellate courts when engaging in the review of evidentiary issues pursuant to their appellate jurisdiction under 28 U.S.C. § 1291 (1948). *See City of Hobbs v. Hartford Fire Insurance Co.*, 162 F.3d 576, 582 (10th Cir. 1998). However, this Court's certiorari jurisdiction is not an appellate jurisdiction. *See* 28 U.S.C. § 1254 (1948). Nor is it concerned with the factual and evidentiary issues arising in a particular case. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) *(citing United States v. Johnson*, 268 U.S. 220, 227 (1925)).

Instead, guided by the prudential considerations contained in Sup. Ct. R. 10, Petitioner is required to demonstrate the existence of an "important" matter and a recognized basis for this Court's certiorari jurisdiction. The concept of importance relates to importance to the public as distinguished from the importance of the issues to the parties involved. *Rice v. Sioux City Cemetery*, 349

U.S. 70, 74 (1955). The only bases for this Court's exercise of its certiorari jurisdiction even mentioned in passing by Petitioner are not present in this case.

A. Petitioner Has Failed To Demonstrate Any Conflict With Relevant Decisions of this Court Or Any Conflict With a Decision of Another United States Court of Appeals as to the Admissibility of the Uniform Incident Reports.

Petitioner states that "the district and appellate courts ignored established Supreme Court precedent" in refusing to admit the incident reports. *Petition at 9.* The basis for certiorari contained in SUP. CT. R. 10 indicates that certiorari "will be granted only when there are special and important reasons therefor." One reason stated in Rule 10 is:

> C. When a state court or United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Even assuming that the outcome of a dispute over an item of evidence in a particular case is an "important" "federal question," Petitioner has failed to demonstrate any conflict between this Court's decisions on the business records exception to the hearsay rule and the Tenth Circuit's decision. The only Supreme Court case cited by Petitioner for the proposition that Supreme Court precedent has been "ignored" is *Bracey v. Gramley,* 520 U.S. 899 (1997). *Bracey v. Gramley* does not discuss the Federal Rules of Evidence, FED.R.EVID. 803(6), or hearsay. *Bracey* is

a case involving a habeas petitioner's request for discovery on his judicial bias claim. Petitioner has failed to show any relationship, no less a "conflict," between the Tenth Circuit's decision and any applicable decision of this Court.

Petitioner next intimates that there is a "conflict" between the Tenth Circuit's decision and the decisions of other United States Courts of Appeal on the admissibility of the uniform incident reports. *See Petition at 10-12* ("Both the district court and the Tenth Circuit Court of Appeals failed to follow precedent established within the Tenth Circuit and other circuits related to the admissibility of police reports without a testifying witness."). The Tenth Circuit's failure to follow its own precedent is not a basis for this Court's jurisdiction even if it were true, which it is not. *See United States v. Snyder*, 787 F.2d 1429, 1433-34 (10th Cir.), *cert. denied*, 479 U.S. 836 (1986). Decisions by other courts of appeal are not "precedent" to be followed by the Tenth Circuit. *See Estate of Morris v. Commissioner of Internal Revenue*, 243 F.3d 1254, 1259 (10th Cir. 2001).

Rule 10 provides for the exercise of certiorari jurisdiction where a circuit court has entered a decision in conflict with another circuit court "on the same important matter . . . " Petitioner has failed to show any conflict between the Tenth Circuit's affirmance of the district court's decision under FED.R.EVID. 803(6) and any other circuits' determinations on this same question. In fact, the majority of cases cited by Petitioner for her assertion that "federal courts have repeatedly admitted police reports into evidence," *Petition at 10*, are cases arising under the public records exception to the hearsay rule, FED.R.EVID.

803(8), a basis that was not argued or demonstrated below or ruled upon by the lower courts. In addition to being irrelevant to the FED.R.EVID. 803(6) issue actually before the district court and the Tenth Circuit, these cases do not support the admissibility of documents similar to the incident reports under the public records exception to the hearsay rule. *See, e.g., Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 160 (1988) (opinion contained in comprehensive Judge Advocate General report admissible under FED.R.EVID. 803(8)(C)); *Thompson v. Office and Professional Employees Int'l Union,* 74 F.3d 1492, 1506 (6th Cir. 1996) (letter from public official not admissible under FED.R.EVID. 803(8)(C) as a public record); *In re Air Disaster at Lockerbie Scotland,* 37 F.3d 804, 827 (2nd Cir. 1994) (report by detective based on law enforcement investigations conducted by other police officers admissible as a public record). *Gilbert v. Gulf Oil Corp.,* 175 F.2d 705, 710 (4th Cir. 1949) (letter inadmissible as business record and "public document") does not support Petitioner's contention and predates the enactment of the Federal Rules of Evidence in 1972 as pointed out to Petitioner's counsel by the trial court judge at oral argument on this matter. ("That's obviously well before the Rules of Evidence. 1949."). These cases do not support Petitioner's contention that a conflict exists among the federal courts of appeal on the admissibility of similar documents. Nor do these cases support the admissibility of the uniform incident reports under the business records exception or the public records exception to the hearsay rule.

Beech Aircraft concerned a "longstanding conflict" among the federal appeals courts regarding the admissibility of the conclusions and opinions contained in

public records pursuant to FED.R.EVID. 803(8). Petitioner sought to introduce the incident reports for the "facts" contained therein. Ms. Armstrong cites only three cases that involve the business records exception, and none of them support her assertion that a conflict among the circuits exists. Nor do they support a result on admissibility different than that determined by the district court and the Tenth Circuit. In *Wilson v. Zapata Off-Shore Company*, 939 F.2d 260, 271 (5th Cir. 1991), the court held that a hospital record may be admitted under FED.R.EVID. 803(6) if every participant in the "chain producing the record" is acting in the regular course of business. In this case, the individuals who reported alleged crimes to the police officers writing the reports were not acting in the regular course of business – they were not under a duty to report honestly or accurately. *See Petitioner's Appendix at 10(a)* ("They consisted of the statements of witnesses to alleged crimes as recorded by police officers").

In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238 (3rd Cir. 1983), the court stated that the testimony of a records custodian was not required "in the occasional case where the requirements for qualification as a business record can be met" by other evidence. *Id. at 288* (emphasis added). In that case, subsequently overruled on other grounds, *see Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the defendants did not challenge the trial court's interpretation of Rule 803(6), that the records could be admitted without the testimony of the records custodian. On appeal, the Third Circuit held that some of the proffered business records could be offered as "a record of what transpired at a particular meeting" by a person with

demonstrated personal knowledge thereof and not for the truth of the double and triple hearsay contained therein. *Id. at 290.* Nor was there any showing of untrustworthiness with regard to the records sought to be admitted. *Id. at 291.* In this case, the untrustworthiness of the business records on the only issue on which they could have been probative, the occurrence of criminal activity, was manifest and would have required accepting double and triple hearsay on the issue of what criminal activity occurred.

Rosario v. Amalgamated Ladies Garment Cutters' Union, 605 F.2d 1228 (2nd Cir. 1979), held that a police report was admissible under Rule 803(6) where the reporting officer testified and where the record was not based on the observations of a bystander or third party. In the case before this Court, the reporting officers did not testify and the proffered reports contained statements regarding alleged crimes reported by third parties whose reliability was questioned by the reporting officers themselves. *See Petitioner's Appendix at 10(a).*

Petitioner's assertion that the Tenth Circuit "failed to follow 'well-established authority' regarding the admissibility of police reports," *Petition at 12,* is not a ground for this Court's assumption of certiorari jurisdiction under SUP. CT. R. 10 and is as equally without basis as Petitioner's assertions that there is a conflict between the circuits or with prior Supreme Court decisions. Petitioner's "well-established authority," *United States v. Versaint,* 849 F.2d 827 (3rd Cir. 1988), concerned the admissibility of a police report under FED.R.EVID. 803(8) where its author testified at trial as to the report's reliability. Petitioner has failed to establish any basis for this Court's exercise of certiorari jurisdiction with regard

to the proffered uniform incident reports. And Petitioner has failed to demonstrate any error by the Tenth Circuit regarding the admissibility of the reports.

B. The Tenth Circuit's Opinion Affirming the Exclusion of Deposition Testimony Regarding the Legal Issue of Whether La Quinta Had a Duty to Petitioner Is Consistent with Other Circuit Courts.

Petitioner has failed to provide any basis for this Court's assumption of certiorari jurisdiction on the issue of the admissibility of Mr. Devine's testimony. Petitioner asserts, without authority, that the Tenth Circuit "ignored well-established precedent within the Tenth Circuit and other circuit courts by disallowing this testimony." *Petition at 15.* Because there is no conflict between the Tenth Circuit's opinion in this case and other circuit courts, the Court should not assume certiorari jurisdiction.

The district court excluded the Devine deposition excerpt on the grounds that it contained a legal conclusion, and the Tenth Circuit's opinion affirming that evidentiary ruling does not conflict with decisions from any other courts of appeals. *Specht v. Jensen,* 853 F.2d 805, 809-810 (10th Cir. 1988), *cert. denied,* 488 U.S. 1008 (1989), sets forth the applicable rule that a witness may not "define the legal parameters within which the jury must exercise its fact-finding function." In this instance, the deposition testimony was properly excluded because it constituted an opinion that La Quinta owed a duty to protect invitees from the intentional torts of third parties. The Tenth Circuit's opinion affirming the district court's

ruling was consistent with *Specht* and with decisions from every court of appeals that has addressed this question. *See Burkhart v. Washington Metropolitan Area Transp. Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997); *Andrews v. Metro North Commuter RR.*, 882 F.2d 705, 709 (2d Cir. 1989); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986); *Snap-Drape, Inc. v. Commissioner of Internal Revenue*, 98 F.3d 194, 198 (5th Cir. 1996), *cert. denied*, 522 U.S. 821 (1997); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985); *Hogan v. AT&T*, 812 F.2d 409, 411 (8th Cir. 1987); *Aguilar v. International Longshoremen's Union Local #10*, 966 F.2d 443, 447 (9th Cir. 1992); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000); *Montgomery v. Aetna Cas. & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

The cases cited by Petitioner in her Petition for Certiorari do not demonstrate a conflict among the circuits on this issue. The cited decisions do not concern a witness "direct[ing] the jury's understanding of the legal standards upon which their verdict must be based." *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1988). Rather, they concern the admissibility of lay opinion testimony under FED.R.EVID. 701. The Devine deposition testimony is inadmissible under FED.R.EVID. 701 and under Petitioner's authority because the opinion sought is neither "rationally based on the perception of the witness" nor "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *See* FED.R.EVID. 701. It is an opinion on an ultimate legal issue to be determined by the Court.

For example, in *Weese v. Schukman*, 98 F.3d 542, 550 (10th Cir. 1996), the Tenth Circuit held that the district court had properly permitted the defendant physician to testify as a lay witness, pursuant to FED.R.EVID. 701, because his opinions "were clearly helpful to an understanding of his decision making process in this situation." Such a situation is distinct from this case, where the proffered deposition testimony is not "based on the perception of the witness," FED.R.EVID. 701, and would have defined the law of the case by instructing the jury that La Quinta owed a duty to protect invitees from the intentional torts of third parties.

Petitioner also relies on *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1124 (10th Cir. 1995), *cert. denied*, 516 U.S. 1146 (1995), in which lay witnesses were permitted to testify that the defendant's premises were safe at the time of the plaintiff's fall. Such factual testimony is distinct from the proffered deposition testimony by Mr. Devine on a matter which was solely within the district court's province – determining the existence of a legal duty.

Similarly, the remaining cases cited by Petitioner, *see Petition at 16-17*, are distinguishable from Mr. Devine's deposition testimony, because those cases also involve lay opinion testimony based on the witnesses' observations or personal knowledge. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 912 (2d Cir. 1997) (based on his personal involvement in the company's personnel ranking procedures witness had a "solid foundation" to testify that age had influenced the defendant's decision to terminate plaintiff); *Samples v. City of Atlanta*, 846 F.2d 1328, 1334 (11th Cir. 1988) (former police officer's testimony that

police department had a policy of not conducting thorough investigations was rationally based on his personal observations from working on the department for nineteen years); *Slayton v. Ohio Dep't of Youth Services*, 206 F.3d 669, 676 (6th Cir. 2000) (witness offered her opinion that certain conduct violated a governmental agency's internal sexual harassment policy, but did not refer to defendants' liability under Title VII); *Burlington Northern RR Co. v. State of Nebraska*, 802 F.2d 994 (8th Cir. 1986) (lay opinion testimony regarding train safety was admissible because it was based on personal knowledge, years of experience in rail industry and review of accident reports prepared in the ordinary course of business); *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347 (8th Cir. 1994) (lay opinion testimony by lockmen was admissible under Rule 701 based upon their extensive personal experience and their observations of the event in question). There is no conflict between these cases, in which lay opinions on factual issues were admitted under FED.R.EVID. 701, and the exclusion of the opinion testimony by Mr. Devine that would have invaded the district court's "province . . . to determine the applicable law and to instruct the jury as to that law." *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985). Petitioner has demonstrated no basis for this Court's exercise of its certiorari jurisdiction and no error by the Tenth Circuit.

IV. THE COURTS' DETERMINATION THAT THE UNIFORM INCIDENT REPORTS SHOULD BE EXCLUDED PURSUANT TO FED.R.EVID. 803(6) WAS IRRELEVANT TO THE TENTH CIRCUIT'S AFFIRMANCE OF THE TRIAL COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW.

The Tenth Circuit affirmed the district court's grant of La Quinta's motion for judgment as a matter of law pursuant to FED.R.CIV.P. 50(a) "for substantially the same reasons set forth in the district court's memorandum opinion . . . " *Petitioner's Appendix at 3(a).* The district court granted the Rule 50(a) motion because "Plaintiff failed to put on sufficient evidence to demonstrate that La Quinta knew or should have known of the risk that Plaintiff would likely be the victim of violent criminal activity on La Quinta's property." *Petitioner's Appendix at 9(a).* The district court noted that applicable Texas law required Petitioner to introduce "strong" evidence that the risk of criminal conduct on La Quinta's property had reached a level indicating that sexual assault was "likely." *Id. at 11(a).* The district court reviewed the factors, recognized by the Texas courts, on which Petitioner was required to make a showing to make a prima facie case against La Quinta. They included:

(1) Whether any criminal conduct previously occurred on or near the property;

(2) How recently it occurred;

(3) How often it occurred;

(4) How similar the conduct was to the alleged incident; and

> (5) What publicity was given the criminal conduct to indicate that the landowner knew or should have known about it.

See Petitioner's Appendix at 8(a)-9(a).

Quite apart from the district court's refusal to admit Petitioner's hearsay reports, the judgment as a matter of law was granted because:

> At the close of Plaintiff's case, there was no evidence from which a reasonable juror could conclude that sexual assault was likely. The only evidence of an even arguably similar crime was the incident in the adjoining Waffle House parking lot 26 months earlier. However, *Plaintiff had no one who could describe the Timberwalk*[3] *criteria as to this incident or any of the other crime reports* in the neighborhood to the Court or jury.

Petitioner's Appendix at 11(a) [emphasis added]. The district court's opinion, adopted by the Tenth Circuit, makes clear that the judgment as a matter of law was based on Petitioner's inability to demonstrate the criteria essential to a prima facie case of premises liability in Texas. The district court's exclusion of the incident reports was based on Petitioner's failure to demonstrate the evidence's relevancy on the *Timberwalk* factors as well as on their hearsay nature. The reports' only possible probative value, proof that the crimes had occurred,[4] was insufficient to allow their admission where there was no showing as to the geographic proximity to the Amarillo La

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[3] *Timberwalk Apartments, Inc. v. Cain*, 972 S.W.2d 749, 758 (Tex. 1998).

[4] The district court correctly noted that the uniform incident reports were not even reliable indications that any crime had actually occurred. *See Petitioner's Appendix at 10(a).* ("While it is difficult to determine from their face, in some

Quinta of the crimes alleged or whether La Quinta knew or should have known about the reported incidents through any "publicity" afforded a particular crime. Had the reports been admitted, Petitioner would have been no closer to establishing a prima facie case on liability.

Thus, even if Petitioner could have cleared the hearsay hurdle, she could not escape judgment as a matter of law because of her inability to prove the *Timberwalk* factors and thereby establish that La Quinta had a duty to protect Petitioner from the intentional torts of third parties.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ELLEN S. CASEY
HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

LAWRENCE W. BAILEY
GODWIN, WHITE & GRUBER, P.C.
901 Main Street, Suite 2500
Dallas, Texas 75202-3727
(214) 939-4461

Counsel for Respondent

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instances, the officers apparently thought such statements suspect and engaged in no further investigation.").